THE INTERNATIONAL INTEREST IN THE SETTLEMENT OF THE PANAMA CANAL TOLL QUESTION.

ADDRESS OF HIS EXCELLENCY GREGERS W. W. GRAM,
Minister of State of Norway.

I esteem it a great honor to address the American Society of International Law, and I beg to express my heartfelt thanks to that Society for having, by its kind invitation, given me an opportunity of so doing.

The subjects suggested for discussion at this sitting of the distinguished Society involve, according to the program which was sent to me, problems of wide bearing and of extraordinary importance. It is proposed to examine into the bearing of the principles of international law on the Panama question which has lately arisen and is pressing for a decision. The responsibility incurred by any one volunteering an opinion on that question is enhanced by the fact that it has given rise to some disagreement between the Governments of the United States and Great Britain. An investigation into the legal principles would fail to get at the root of the matter if we do not, in addition, consider the points raised in the diplomatic communications that have been exchanged. I have regarded the invitation of this distinguished Society as being in the nature of a mandate, and on this assumption, of presenting to you my view of the important issues before us, without in any way attempting to arrogate the high mission of an arbiter. I am confident that you will forgive me if, owing to the short notice given to me, I have been obliged to confine myself to a brief discussion of the principal issues—a discussion which I dared to undertake in the hope that I might have opportunity to confer with some other jurists from abroad, present on this occasion.

The international legal relations involved in the Panama question rest on the treaty, concluded on November 18, 1901, between the United States of America and Great Britain, relative to the establishment of a communication by ship canal between the Atlantic and Pacific Oceans.

This treaty, commonly called the Hay-Pauncefote Treaty, states that it is agreed that the canal may be constructed under the auspices of the Government of the United States, either directly at its own cost, or by gift or loan of money to individuals or corporations, or through subscription to or purchase of stock or shares, and that, subject to the provisions of the treaty, the said government shall have and enjoy

all the rights incident to such construction, as well as the exclusive right of providing for the regulation and management of the canal.

Article 3 of the same treaty contains the following provisions:

> The United States adopts, as the basis of the neutralization of such ship canal, the following rules, substantially as embodied in the Convention of Constantinople, signed the 28th October, 1888, for the free navigation of the Suez Canal, that is to say:
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> 1. The canal shall be free and open to the vessels of commerce and of war of all nations observing these rules, on terms of entire equality, so that there shall be no discrimination against any such nation, or its citizens or subjects, in respect of the conditions or charges of traffic, or otherwise. Such conditions and charges of traffic shall be just and equitable.

Then follow five other rules concerning different matters connected with the use of the canal, in time of war as in time of peace.

In Article 4 of the treaty it is agreed that no change of territorial sovereignty or of the international relations of the country or countries traversed by the beforementioned canal shall affect the general principle of neutralization or the obligation of the high contracting parties under the present treaty.

With regard to the text now quoted, this question presents itself:

Does the term "all nations," in Article 3, include the United States?

It has been said, as a proof that the question should be answered in the negative, that the rules are but a basis of neutralization, intended to establish the neutrality which the United States was willing should be the character of the canal, and not intended to limit or hamper the United States in the exercise of its sovereign power to deal with its own commerce, using its own canal in whatsoever manner it saw fit. In the same sense it is argued that the before-mentioned provisions of the treaty only imply a conditional most-favored-nation treatment, the measure of which, in the absence of express stipulations to that effect, is not what the country gives to its own nationals, but the treatment it extends to other nations.

In the first place, I call attention to the fact that the text, the interpretation of which is in dispute, is not in the nature of a provision of municipal law, but is inserted in a treaty concluded between two Powers.

The conclusion of a treaty requires the harmonious coöperation of the contracting Powers, and as the outcome of the negotiations

previously conducted, reciprocal rights and obligations are laid down. It naturally follows that if either Power desires to reserve to itself liberty of action with a view to limiting the operation of the treaty provisions, such liberty of action must have been expressly stipulated for under the treaty. The terms of Article 3 of the aforementioned treaty do not indicate that either of the contracting Powers reserved to itself rights or privileges which would exempt that Power from the conditions established for nations at large.

Next to the wording of the provisions, we must consider the substance of the provision itself and its relation to other provisions. Further, it must be ascertained whether some illustration of the text may be derived from the circumstances under which the treaty was arrived at.

At the opening of Article 3 of the Hay-Pauncefote Treaty it is said that the following rules are substantially the same as those embodied in the convention concerning the Suez Canal.

A comparison of the regulations concerning the matter in the two treaties aforementioned will make clear what is the true construction to be put on those lines.

The Panama Canal, according to the treaty of 1901, is to be "free and open to the vessels of commerce and of war of all nations observing these rules, on terms of entire equality."

As to the Suez Canal, the treaty of 1888, Article 1, provides that it "shall always be free and open, in time of war as in time of peace, to every vessel of commerce or of war, without distinction of flag.

"Consequently the high contracting parties agree not in any way to interfere with the free use of the canal, in time of war as in time of peace."

The Hay-Pauncefote Treaty provides that "there shall be no discrimination against any such nation, or its citizens or subjects, in respect of the conditions or charges of traffic, or otherwise. Such conditions and charges of traffic shall be just and equitable."

Article 12 of the Treaty of Constantinople provides:

> The high contracting parties, by application of the principle of equality as regards the free use of the canal, a principle which forms one of the bases of the present treaty, agree that none of them shall endeavour to obtain with respect to the canal territorial or commercial advantages or privileges in any international arrangements which may be concluded. Moreover the rights of Turkey as the territorial Power are reserved.

Article 13 of the same treaty provides:

> With the exception of the obligations expressly provided by the clauses of the present treaty, the sovereign rights of His Imperial Majesty the Sultan, and the rights and immunities of His Highness the Khedive, resulting from the firmans, are in no way affected.

The comparison of these clauses seems to me to afford a key to the bearing of the words "all nations" in Article 3 of the Hay-Pauncefote Treaty.

The agreement entered into with regard to the use of the Suez Canal indicates, in my opinion, that the rules laid down in it are binding on *all* Powers, with no exception whatever.

The sovereign rights of the Sultan are reserved, subject, however, to the express limitation which results from the regulations established by the treaty.

This, it may be added, is also the way in which the Suez Canal Treaty has at all times been executed. It has never been suggested that, with regard to the conditions laid down for the use of the canal, either Turkey or Egypt should be in a different position from that of any other nation.

If we bear in mind the wording and the substance of Article 3, on which, as on the central fact, we must take our stand, no argument to the contrary can be derived from the circumstance that the Panama Canal is being constructed by the United States wholly at its own cost, upon territory ceded to it by the Republic of Panama for that purpose.

The relations between the United States and Panama, with regard to the construction of the canal, are regulated by the treaty of November 18, 1903, between those countries.

Article 2 of the treaty provides:

> The Republic of Panama grants to the United States in perpetuity the use, occupation and control of a zone of land and land under water for the construction, maintenance, operation, sanitation and protection of said canal of the width of ten miles, extending to the distance of five miles on each side of the center line of the route of the canal to be constructed.

At the same time the Republic grants to the United States in perpetuity the use, occupation and control of any other lands and waters

outside of the zone which may be necessary or convenient for the purpose.

Article 3 of the said treaty grants to the United States all the rights, power and authority within the zone beforementioned and within the limits of all auxiliary lands and waters which the United States would possess and exercise if it were the sovereign of the territory within which said lands and waters are located, to the entire exclusion of the exercise by the Republic of Panama of any such sovereign rights, power or authority.

The treaty concluded between the United States and the Republic of Panama has, however, been made to harmonize completely with the Hay-Pauncefote Treaty by the insertion in Article 18 of the former treaty of the following provision:

> The canal, when constructed, and the entrances thereto shall be neutral in perpetuity. and shall be opened upon the terms provided for by Section 1 of Article 3 of, and in conformity with all the stipulations of, the treaty entered into by the Governments of the United States and Great Britain on November 18, 1901.

The contention that the expression "all nations" in Article 3 of the Hay-Pauncefote Treaty includes the United States, receives additional support from the circumstances relative to the genesis of that treaty.

The project of establishing communications, whether by canal or railway, across the isthmus which connects North and South America, had already led to a previous convention between the United States and Great Britain. That treaty—the Clayton-Bulwer Treaty of April 19, 1850—laid down the specific conditions on which such an undertaking might be carried out.

Article 1 of the said treaty contains a declaration of the two governments to the effect that neither the one nor the other would ever obtain or maintain for itself any exclusive control over the said ship canal. In the same article it is said:

> Nor will the United States or Great Britain take advantage of any intimacy, or use any alliance, connection or influence that either may possess with any state or government through whose territory the said canal may pass, for the purpose of acquiring or holding, directly or indirectly, for the citizens or subjects of

the one, any rights or advantages in regard to commerce or navigation through the said canal, which shall not be offered on the same terms to the citizens or subjects of the other.

Article 8 provides:

> The Governments of the United States and Great Britain having not only desired, in entering into this convention, to accomplish a particular object, but, also, to establish a general principle, they hereby agree to extend their protection, by treaty stipulations, to any other practicable communications, whether by canal or railway, across the isthmus which connects North and South America, and especially to the interoceanic communications, should the same prove to be practicable, whether by canal or railway, which are now proposed to be established by the way of Tehuantepec or Panama. In granting, however, their joint protection to any such canals or railways as are by this article specified, it is always understood by the United States and Great Britain that the parties constructing or owning the same shall impose no other charges or conditions of traffic thereupon than the aforesaid governments shall approve of as just and equitable; and that the same canals or railways, being open to the citizens and subjects of the United States and Great Britain on equal terms, shall also be open on like terms to the citizens and subjects of every other state which is willing to grant thereto such protection as the United States and Great Britain engage to afford.

On the occasion of the conclusion of the Hay-Pauncefote Treaty the contracting Powers agreed that the treaty should supersede the convention of April 19, 1850.

At the same time, however, the preamble to the treaty intimates that the two Powers were desirous to facilitate the construction of a ship canal to connect the Atlantic and Pacific Oceans, by whatever route may be considered expedient, and to that end to remove any objection which may arise out of the Clayton-Bulwer Treaty to the construction of such canal under the auspices of the Government of the United States, "without impairing the *general principle* of neutralization established in Article 8 of that convention."

The fact, then, is this, that by the treaty of 1901, the United States obtained the right to construct the canal themselves, but on this condition, that the general principle of neutralization established in Article 8 of the convention of 1850 should not be impaired. The principle was that the canal should be open to the citizens and subjects of

the United States and Great Britain on equal terms and should, also, be open on like terms to the citizens and subjects of every other state which was willing to grant such protection as the United States and Great Britain engage to afford.

For the reasons I have given, the aforementioned treaty provisions, whether separately or jointly, do not appear to give any support to the theory that the United States are exempt from the rule prescribing equality for all ships passing through the canal. Nor can anything to the contrary be inferred from the statements made in course of the diplomatic negotiations and parliamentary discussions relative to the purpose and bearing of the Hay-Pauncefote Treaty.

In the speech made by the Honorable Elihu Root in the Senate of the United States on the 21st of January of this year—a speech which is far above any praise or commendation of mine—the Honorable Senator proved that during the discussion of the treaty in the United States utterances have repeatedly been made in direct support of the theory that the construction to be put on Article 3 of the treaty must be consistent with the actual text of that article, its words to be interpreted in a strictly literal sense.

I beg to refer to the extract quoted by Senator Root from Mr. Blaine's instructions, given in 1881, on the occasion of the opening of negotiations with Great Britain for a modification of the Clayton-Bulwer Treaty.

I further beg to refer to the quotations given in Mr. Root's speech from the utterances of Senator Davis in his Report from the Committee on Foreign Relations.

I also refer to the fact, stated in the same speech, that in view of that report the Senate rejected the amendment which was offered by Senator Bard, providing for preference to the coastwise trade of the United States.

I think, however, that this great problem of our day should be considered from a higher point of view.

The ocean is free. It is, from its very nature, exempt from the control of man; all nations, whether great or small, are equal on its waters.

For that reason, the right of navigating the seas appertains to all. Any limitation on the exercise of this right is impracticable. Nor can it be denied that the principle of a free sea agrees perfectly with the interests of all mankind.

However, though man may not be able to bend the ocean to his will, he can assist the benevolent efforts of nature. He can connect the oceans in places where the terra firma raises obstacles in the way of free intercourse and divides the seas from each other. Those are undertakings the greatness and importance of which cannot be measured by a reference to the sum of human energy, insight and labor required by their achievement. They are enterprises for the benefit, not of one nation or another, but of all mankind.

It is just and equitable that those who benefit by a giant achievement of this kind should bear their share of the economic sacrifices entailed by the actual construction of the works as well as by their maintenance in future. Nor can any just objection be raised against an arrangement by which the control of the works is entrusted to the Power which has gained undying glory by overcoming the formidable difficulties in the way of the execution of the project. Nor can anything be said against the same Power undertaking to protect the works after completion, in time of peace as in time of war.

The great object of the work, however, very naturally leaves its stamp upon the work. It is natural that the connection established between two oceans should be placed on an equal footing with those oceans with regard to the principle that the navigation shall be free and open to all and ought to be exercised on equal terms for all.

This is a lofty point of view on which all nations may concur. It is the same idea which seems to have united in a common feeling two of the greatest nations of the world when it is stated that, on entering into the convention, they have not only desired to accomplish a particular object, but also to establish a general principle.

The disagreement between the governments of the two countries which are parties to the aforesaid treaty has chiefly manifested itself in respect of certain provisions contained in "An Act to provide for the opening, maintenance, protection and operation of the Panama Canal, and the sanitation and government of the Canal Zone." This Act was signed by the President of the United States on August 24, 1912.

In this Act, Section 5, it is provided that

> No tolls shall be levied upon vessels engaged in the coastwise trade of the United States,

and further:

> Tolls may be based upon gross or net registered tonnage, displacement tonnage, or otherwise, and may be based on one form of tonnage for warships and another for ships of commerce. The rate of tolls may be lower upon vessels in ballast than upon vessels carrying passengers or cargo. When based upon net registered tonnage for ships of commerce, the tolls shall not exceed one dollar and twenty-five cents per net registered ton, nor be less, other than for vessels of the United States and its citizens, than the estimated proportionate cost of the actual maintenance and operation of the canal subject, however, to the provisions of Article 19 of the convention between the United States and the Republic of Panama, entered into November 18th, 1903.

The principle underlying the provisions, here quoted, of the Panama Canal Bill, is, I think, for reasons already given hardly consistent with Article 3 of the Hay-Pauncefote Treaty.

To exempt from payment of tolls vessels engaged in the coastwise trade of the United States, and to fix the tolls to be paid by ships which are the property of American citizens on another ratio than that which is established for the vessels of other countries do not appear to be easy to reconcile with the regulation of the treaty to the effect that there shall be no discrimination against any nation or its citizens in respect to the conditions or charges of traffic, or otherwise.

It has been said that the principle of equality of treatment has no reference to the coastwise trade of the United States, which, in accordance with general usage, is reserved to American ships.

The authority of the United States to make a provision in this respect is not, however, incompatible with its treaty obligation to extend to all the ships making use of the canal an equal treatment. A foreign Power can not, on the strength of the Hay-Pauncefote Treaty, demand for its subjects any right to take part in the coastwise trade of the United States. On the other hand, however, the principle of equality established by the treaty is not subject to any limitation from the fact that it is reserved to each state, with sovereign authority, to issue regulations for the shipping trade of its subjects.

Nor, according to the view here presented, would the rules of the Hay-Pauncefote Treaty be incompatible with the sovereign right of states to grant subsidies to their shipping. There is no need, on this occasion, to investigate in detail how the custom of granting shipping

subsidies works out in the different forms which it may adopt. In the very nature of things, subsidies may be granted to the ships of one nation in such a way as to constitute a violation of the principle of the treaty concerning equality. Such would be the case if the subsidies were paid out of the funds constituted by the canal tolls. This circumstance, however, does not affect the general principle that each country must be free to promote the interests of its shipping by such measures as may be thought convenient for the purpose.

There are other questions of a legal nature which are worthy of an investigation, more especially in such an assembly as that which I have the privilege to address. Is the difference that has arisen concerning the consistence of the Panama Canal Bill of such a nature that one of the parties interested is entitled to claim a decision by arbitration?

We all know the treaty of 1908, we know that it provides that differences which may arise of a legal nature or relating to the interpretation of treaties between the two contracting parties and which it may not have been possible to settle by diplomacy, shall be referred to the Permanent Court of Arbitration established at The Hague by the convention of the 29th of July, 1899, provided, nevertheless, that they do not affect the vital interests, the independence, or the honor of the two contracting states, and do not concern the interests of third parties.

It has been urged that the canal Act does not fix the tolls, that the proclamation of the President ought to be more closely examined, and that it is still uncertain whether the tolls will injure in their operation British shipping.

It has also been urged that only questions which it may not have been possible to settle by diplomacy are to be referred to arbitration.

Allow me, instead of offering now a direct opinion on this point, to suggest another question: Ought we not to consider these matters in the light of the new situation, of that revolution in the methods of international intercourse which in a near future we shall witness?

That which the nations have been dreaming of for ages, has come true. The earth inhabited by men takes on a new aspect, one tie is cut asunder, but only to give place to a new tie which shall, in a deeper sense of the word, be able to unite the countries. The remotest regions of the world are brought nearer to each other, a new thoroughfare is opened, at which all nations give each other the rendezvous. A new competition sets in, destined, not to afford an

opportunity of a trial of strength, but to aid and facilitate the accomplishment of the tasks which Providence has set the inhabitants of this earth. There is no limit to the progress of which the world is capable; the promotion of progress in the domain of things material as well as in the domain of things spiritual, is the result of the patient coöperation of centuries. In the history of the twentieth century, the accomplishment of the construction of the Panama Canal will form one of the most prominent landmarks, a great nation has added a new link to the mighty chain with which the spirit of solidarity and fraternity has encompassed the globe.

I trust I may be allowed to express a hope that the grand vision which has united all the parties of the American nation in an effort to solve the problem, will remain as powerful as ever when the great work is soon to be handed over in trust to the generations of the future.

One more consideration I would urge.

The conscience and the sense of justice of man is not satisfied if the principles of justice and equality which it is acknowledged should govern the actions of isolated communities are not to be applied to the problems of international relations. It is a change in this direction which is the object of modern efforts to promote the development of international law. The history of international law bears testimony to the prominent place held by the United States in this respect. The United States has taken a leading part in the struggle of mankind to ensure that international differences which it has been found impossible to settle by agreement, shall be referred to arbitration. The United States has, by its actions, shown that it does not shrink from laying important disputes with a foreign Power before an impartial tribunal.

The recapitulation of that which it has been my heart's desire to say on this matter shall take the form of a respectful appeal to consider whether the difference that has arisen is of such importance that it may be possible to misjudge the attitude of the United States toward the great interests affected by this problem.

Entertaining, as I do, a very high opinion of those who are at the head of the affairs of this country, I have no doubt that the decision to which the United States will come will be consistent with the lofty views which the world has been accustomed to see this community constantly urging, in theory and acting up to in practice, whether it is to be done through the adoption of measures which the government

of this country reserves to itself, or by the interpretation of the disputed treaty provisions being referred to arbitration by impartial men.

The CHAIRMAN. I am sure, ladies and gentlemen, I express a sentiment common to all when I extend to his excellency, Mr. Gram, our very sincere thanks for crossing the ocean to be with us tonight and for the expression of his carefully matured opinion on the question of the Panama tolls.

The meeting this evening has been of a general and introductory character. The question of the Panama tolls will be discussed in its various phases at three sessions of the Society, tomorrow morning at ten o'clock, tomorrow afternoon at 2:30 o'clock, and tomorrow evening at eight o'clock. You will note that in arranging the program, questions of a non-controversial character have been assigned to one speaker only, whereas if the question be of a non-historical and of a contentious character, two speakers have been secured, one to speak on the affirmative side and the other to speak on the negative side of the question, so that the views maintained by Great Britain and the United States on this important matter shall be discussed by those most competent.

There being no discussion of the papers this evening, as it is the opening session, although there will be a discussion of each paper at its conclusion tomorrow, I declare the meeting of this evening adjourned.

[Thereupon, at 10:15 o'clock p.m., the Society adjourned until 10 o'clock a. m., Friday, April 25th.]